LOW HOCK JEE

v.

MAYBAN FINANCE BERHAD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DATO' SULEIMAN BIN HASHIM J
[CIVIL SUIT NO. K. 156 OF 1992]
22 JANUARY 1996

CONTRACT: *Sale of goods - Purchase of motor vehicle by public tender - Purchase effected in Kota Kinabalu, Sabah - Applicable law - Whether that of the United Kingdom Sale of Goods Act 1979 - Vehicle seized by Customs subsequent to sale - Whether there was failure of consideration - Whether defendant liable to refund - Maxim nemo dat qui nonhabet - Whether to be applied - Civil Law Act 1956 s. 5(2) - Sales of Goods Act 1979 (U.K) s. 12(1), 12(2)(a), 12(2)(b), 12(3), 53.*

WORDS & PHRASES: *"As is where is".*

The plaintiff had purchased a Mercedez Benz 280SE by public tender from the defendant for RM100,000. The tender was transacted through the branch offices of the defendant at Kota Kinabalu, Sabah and Miri, Sarawak respectively. At the material time the car was kept by the defendant's Kota Kinabalu office, and was handed over to the plaintiff after payment in full was made to the defendant's headoffice in Kuala Lumpur. Subsequent to the purported sale, the car was seized by the Customs and Excise Department, apparently for an offence under s. 135(1)(d) Customs Act 1967. An offence under this section, as it was, rendered the car susceptible to forfeiture under s. 128 of the Act.

The plaintiff claimed that consideration for the car in the circumstances had failed, and so, sued for the refund of the price money. He argued that it was a condition of the tender that the defendant had the right to sell the car free from incumbrances, and further, that there was an implied warranty that he should have a quiet possession of the car. The defendant denied any such failure of consideration, condition or warranty as alleged, contending on the contrary that, by the circumstances of the sale, an inference arose that it would only transfer such title as it had at the time of the sale. This apart, the defendant also disclaimed liability on the ground that the car was purchased on an "as is where is basis", which term, according to the defendant, meant that *"the tenderer will take the vehicle as it is"*. The plaintiff admitted to inspecting the car prior to the sale, but claimed no knowledge of the history of the car.

The primary issue that arose was whether on the facts the principle of *nemo dat qui nonhabet* applied against the defendant, and if so, whether s. 12(3) of the Sale of Goods Act 1979 (U.K) would apply to relieve the defendant from liability .

Held:

[1] The Malaysian Sale of Goods Act 1957 is not applicable to Sabah and Sarawak. By reason of s. 5(2) Civil Law Act 1956, reference has to be made to s. 12 of the United Kingdom Sale of Goods Act 1979, being the law applicable to Sabah and Sarawak with effect from 1 January 1980.

[2] Upon the sale of the motor car by the defendant to the plaintiff, s. 12(1), 12(2)(a) and 12(2)(b) of the 1979 Act, particularly s. 12(2)(b) thereof, must operate in favour of the plaintiff, the accepted principle being *nemo dat qui nonhabet* or "no one gives who possesses not". In the premises the plaintiff has discharged the burden of establishing his claim against the defendant, and it is up to the defendant to avail itself of s. 12(3) of the Act and show that "it can be inferred from the circumstances surrounding the sale that it was intended that the defendant shall transfer only such title as it has at the time of the sale".

[3] The meaning to be attached to the trade usage *"as is where is"* must be subjected to the test of reasonableness i.e what a reasonable, honest and right minded person would consider fair and proper. A usage which outrages the sense of justice and commonsense is not reasonable.

[4] Irrespective of the explanation offered by the defendant, there is no evidence that the trade usage of the term *"as is where is"* includes matters pertaining to the title of the motor car envisaged in s. 12(3) of the Act. There are no circumstances to show that such is the trade usage of *"as is where is"*. In any case, a person can only be assumed to have acquiesced in a reasonable trade usage, and in this case the reasonableness of the defendant's claim to the trade usage is doubtful.

[5] The defendant has not adduced sufficient evidence in support of its averment, and therefore, has not discharged the burden of proof to avail itself of s. 12(3) of the Act.

[Judgment for plaintiff]

Cases referred to:
Heng Leong Trading Co. v. Osman bin Abdullah [1994] 2 MLJ 456 ***(foll)***
Mason v. Burningham [1949] 2 All ER 134 ***(foll)***
Microbeads AC & Anor. v. Vinhurts Road Markings Ltd. [1975] 1 All ER 520 ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 5(2)
Sale of Goods Act 1979 (UK), s. 12(1), 12(2)(a), 12(2)(b), 12(3), 353

Other sources referred to:
Benjamin's *Sale of Goods,* 3rd Edn., pp. 7-8.

For the plaintiff - Lim Pitt Kong
For the defendant - David Fung Yin Kee

JUDGMENT

Suleiman Hashim J:

The statement of agreed facts is:

1. That the defendant is a licensed finance company wholly owned by Malayan Banking Berhad which, amongst other places, operates from its Miri branch at Lot 118, Jalan Permaisuri, CDT No. 200, 98008 Miri, Sarawak, Malaysia.

2. That in particular, the defendant also maintains or otherwise has a place of business at 14-16, Block K, Jalan Ikan Juara Satu, Sadong Jaya, Karamunsing, 88100 Kota Kinabalu, Sabah, Malaysia, within the local jurisdiction of the High Court of Borneo at Kota Kinabalu.

3. That the said vehicle, one (1) unit of Mercedes Benz 280 SEL bearing registration No. QM 55 was at all material times kept at the defendant's Kota Kinabalu branch store in Inanam, Kota Kinabalu, and with the local jurisdiction of the High of Borneo at Kota Kinabalu.

4. That the engine No. of the said vehicle should read in full as 11098922032667; and its chassis No. should read as WDB 12603 22081083.

5. That the plaintiff's tender was submitted by him to one Mr. Chia whom the plaintiff believes to be the Credit Controller of the defendant's Kota Kinabalu branch for onward transmission to the defendant's Miri branch after the said Mr. Chia has brought the plaintiff to inspect the physical condition of the said vehicle at the defendant's Kota Kinabalu branch storage yard in Inanam, Kota Kinabalu.

6. That the purchase price of RM100,000 for the said vehicle was paid in full to the defendant through the defendant's Kuala Lumpur Head Office whereupon possession of the said vehicle was given to the plaintiff in Kota Kinabalu.

7. That it was an implied condition of the said public tender that the defendant had the right to sell the said vehicle.

8. That on 3 February 1992, the said vehicle was seized from the plaintiff's possession and custody by the Customs and Excise department, Kota Kinabalu, pursuant to s. 114 of the Customs Act 1967 for a suspected offence under s. 315(1)(d) of the Act and liable to forfeiture under s. 128 of the Act.

9. That the defendants did admit receiving a letter of demand dated 16 July 1992 from the plaintiff's solicitors demanding for the refund of the sum of RM100,000.

And the plaintiff further avers in the amended statement of claim dated 3 February 1993:

6. It was an implied condition of the said public tender that the defendant had, or alternatively at the time of the delivery of the said vehicle to the plaintiff, the defendant would have the right to sell the said vehicle free from any encumbrances.

7. Further, it was an implied warranty of the said public tender by the defendant:

(a) that the plaintiff should have and enjoy quiet possession of the said vehicle; and

(b) that the said vehicle should be free from any encumbrances and, in particular, that the vehicle does not contravene any laws in Malaysia for the time being in force.

8. In breach of the said conditions and warranties:

(a) the defendant did not have the right to sell the said vehicle free from any encumbrances;

(b) the plaintiff did not have or enjoy quiet possession of the said vehicle after the said sale by public tender; and

(c) the said vehicle was not free from encumbrances.

Particulars

On 3 February 1992, the said vehicle was seized from the plaintiff's possession and custody by the Customs and Excise department, Kota Kinabalu, pursuant to s. 114 of the Customs Act 1967 for a suspected offence under s. 135(1)(d) of the Act and liable to forfeiture under s. 128 of the Act. The said vehicle has not been released to the plaintiff as at the date hereof. The plaintiff has no knowledge whatsoever of the history of the said vehicle and the defendant had been informed of the seizure by the plaintiff by letter to the defendant dated 24 February 1992.

9. By reason of the matters aforesaid, in particular the actions of the Customs and Excise department, the plaintiff has lost the said vehicle, and the consideration for the payment of the purchase price of RM100,000 by the plaintiff has wholly failed.

10. Wherefore the plaintiff has suffered loss and damage and despite the plaintiff's demand for refund of the sum of RM100,000 through his solicitors by letter dated 16 July 1992, the defendant has failed or otherwise

refused to do so. Consequently, the plaintiff has been put to loss and expense by having to incur legal fees and expenses for instituting these proceedings against the defendant.

And the plaintiff claims:

1. The sum of RM100,000;
2. Further or alternatively, damages to be assessed;
3. Interest thereon at the rate of 8% per annum pursuant to s. 11 of the Civil Law Act 1956 from 5 September 1992 until the date of judgment;
4. Statutory interest thereon at the rate of 8% per annum from the date of judgment until full payment;
5. Reimbursement of legal fees and expenses on a full solicitor and client indemnity basis to be taxed unless otherwise agreed;
6. Costs; and
7. Any other just relief that the Honourable Court deems fit.

Defendants deny and further avers:

6. The defendant denies that the registration card and third party insurance cover note for the said vehicle was forwarded to the plaintiff at his Kuala Lumpur address as alleged in para. 5 of the amended statement of claim. The defendant avers that on 24 January 1992, the plaintiff personally collected the registration card and insurance cover note from the defendant's Miri branch.
7. As to para. 6 of the amended statement of claim, the defendant admits that it was an implied condition of the public tender that the defendant had the right to sell the said vehicle to the plaintiff, but denies that there was also an implied condition that the vehicle was free from any encumbrances.
8. The defendant denies that there was an implied warranty in the public tender in the terms as alleged by the plaintiff in para. 7 of the amended statement of claim or at all.
9. Further, and in the alternative, the defendant avers that there appears from the contract of sale of the said vehicle between the plaintiff and the defendant, or it can be inferred from the circumstances surrounding the sale, that it was intended that the defendant shall transfer only such title as it has at the time of the sale. The contract and the circumstances surrounding its conclusion are as follows:

(a) The said vehicle was a second-hand vehicle, and it was under hire-purchase with one Sim Kwang Ngee ("the Hirer") when it was repossessed on about 12 November 1991; the Hirer voluntarily surrendered the said vehicle to the defendant. The said vehicle was bought as a second-hand vehicle from a dealer called Win Motors Company in Miri, Sarawak (a sole proprietorship owned by

one Ho Chun Foh) for the use and possession of the Hirer under a hire-purchase agreement dated 20 March 1991 between the Hirer and the defendant. The said dealer has ceased trading.

(b) Three (3) days before the Hirer surrendered the said vehicle, that is, on 9 November 1991, the Hirer had requested the defendant to send by facsimile a copy of the registration card of the said vehicle to him to assist the Police investigation in Kota Kinabalu.

(c) After the surrender of the said vehicle, the plaintiff has on several occasions requested for extension of time to pay the outstanding balance of RM86,620 odd, representing that the Hirer was his business partner and that it was he who had persuaded the Hirer to surrender the said vehicle to the defendant.

(d) By a letter to the defendant dated 28 November 1991, the Hirer informed that he had authorised the plaintiff to liaise with the defendant regarding the sale and purchase of the said vehicle.

(e) Before the defendant advertised tender for sale of the said vehicle, the plaintiff had already submitted his offer to purchase the said vehicle at the price of RM100,000 on an "as is where is" basis.

(f) There were no other offers to purchase the said vehicle, and the defendant on 17 January 1992 accepted the plaintiff's offer to purchase the said vehicle at RM100,000 on an "as is where is" basis.

(g) On 22 January 1992, the said purchase price was paid to the defendant's head office in Kuala Lumpur by a company called Nigcom Implex (M) Sdn. Bhd. based in Kuala Lumpur.

10. As to para. 8 of the amended statement of claim, the defendant admits that the said vehicle was on 3 February 1992 seized from the plaintiff's possession by the Customs and Excise Department, Kota Kinabalu, under the relevant provisions of the Customs Act 1967; but the defendant denies that it had breached the said conditions and warranties. The defendant avers that following the sale of said vehicle to the plaintiff on about 24 January 1992, title or property in the said vehicle passed to the plaintiff.

11. The defendant also denies that the plaintiff has no knowledge of the history of the said vehicle as alleged in para. 8 of the amended statement of claim. The defendant avers that the plaintiff knew or has reasons to know of the history of the said vehicle because of his close association with the Hirer and his special interest in the said vehicle, and for the particulars of which, the defendant relies on sub-paragraphs 9(c) to (e) above.

12. The defendant denies that the consideration for the said vehicle has wholly (or totally) failed as alleged in para. 9 of the amended statement of claim. The defendant also denies that the plaintiff has totally lost the said vehicle, and that it is incumbent upon him, as owner of the said vehicle, to secure the release of the said vehicle from the department of Customs and Excise.

13. As to para. 10 of the amended statement of claim, the defendant admits receiving the letter of demand dated 16 July 1992 demanding for the refund of the sum of RM100,000 but denies that it is liable to refund the said sum, or pay the alleged loss and expense brought about by these legal proceedings as alleged therein.

14. Save as is hereinbefore specifically admitted or not admitted, the defendant denies each and every allegation contained in the amended statement of claim as though the same were herein set forth and traversed *seriatim*.

Counsel for plaintiff tendered a written submission dated 19 January 1996, Counsel for defendant made an oral submission. I shall direct my mind to s. 12 of the United Kingdom Sale of Goods Act 1979, the law applicable in Sabah, incidentally applicable in Sarawak as well with effect from 1 January 1980, *vide* s. 5(2) Civil Law Act 1956, the Malaysian Sale of Goods Act 1957 being not applicable in Sabah and Sarawak.

Agreed Bundle of Documents (ABD) 24 refers to the "Terms and Conditions of Sale Re: Tender of Vehicle/Machine No. ...", it was agreed referred to the tender for the motor car in question and Clause 1 is:

> The sale of the vehicle-machine shall be an 'as is where is' basis.

Puan Lee Li (DW1), assistant branch manager (Operations), Mayban Finance Berhad, Miri, gave evidence and during examination-in-chief said:

S. ABD24 'as is where is'. What do you mean?

J. It means the tenderer will take the vehicle as it is.

S. At the time of entry of hire-purchase did you have any knowledge or suspect Customs duty had not been paid in respect of the vehicle?

J. No.

And during cross-examination DW1 said:

S. Procedure before finance car, in this case did you bother to find out whether the car was an imported car or a locally assembled in Malaysia car?

J. No.

S. Are you aware for a car to be imported you must have proper import form?

J. Yes.

S. Is it not important for you to find out?

J. If it is for the first registration then yes but in this case it was for the fourth owner.

S. Did Maybank finance the first three owners?

J. No. We finance the fourth owner, Sim.

S. 'As is where is' do you agree it only refers to the physical condition of the vehicle?

J. It means that there is a registration card available that is transferable, the tenderer comes in and if he is satisfied with the vehicle he pays us the money and he takes the vehicle.

And during re-examination DW1 said:

S. You were asked whether you expected plaintiff to be aware of the Customs claim at time vehicle sold, at that time the Customs claim was not an issue, a problem?

J. It was not the problem.

S. Was the vehicle transferred to Mr. Law with no problems?

J. Yes, transferred to Mr. Low with no problems.

Thus I need to consider on the facts of the case before me whether s. 12(1), 12(2)(a) and 12(2)(b) of the United Kingdom Sale of Goods Act 1979 is applicable in favour of plaintiff or whether s. 12(3) of the Act is applicable in favour of defendants, i.e. whether as averred by plaintiff at paras. 6 to 8 of the amended statement of claim dated 3 February 1993 or whether as averred by defendants at paras. 6 to 14 more particularly at para. 9 of the statement of defence. The s. 12 is:

12 Implied terms about title, etc.

(1) In a contract of sale, other than one to which subsection (3) below applies, there is an implied condition on the part of the seller than in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.

(2) In a contract of sale, other than one to which subsection (3) below applies, there is also an implied warranty that:

(a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and

(b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

(3) This subsection applies to a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have.

(4) In a contract to which subsection (3) above applies there is an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.

(5) In a contract to which subsection (3) above applies there is also an implied warranty that none of the following will disturb the buyer's quiet possession of the goods, namely:

(a) the seller;

(b) in a case where the parties to the contract intend that the seller should transfer only such title as third person may have, that person;

(c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.

With respect I am of opinion that upon the sale of the motor car by defendants to plaintiff, if I may say so, more particularly that the full purchase price was paid by plaintiff to defendants and acknowledged received by defendants, i.e. more particularly with the completion of the sale, s. 12(1), 12(2)(a), 12(2)(b) more particularly s. 12(2)(b) of the Act comes into force and operates in favor of plaintiff, the established/accepted principle being *Nemo dat qui nonhabet* (No one gives who possesses not) and plaintiff would thus have discharged plaintiff's burden of proof to establish plaintiff's claim against defendants.

On the burden of proof, on the onus of proof as explained in *International Times* [1980] 2 MLJ 86 FC at 87:

For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co. v. Jatashankar Dossa & Ors.* and *Raghavamma v. Chenchamma*). The first sense, signified by the expression burden of proof such as referred to in s. 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* 7th Edn., paras. 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss. 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

And the onus now shifts to defendants to avail themselves of s. 12(3) of the Act, as they seem to desire, paras. 6 to 14 more particularly para. 9 of the statement of defence, by adducing sufficient evidence in support of such averment, such affirmation.

Thus I need to examine whether or not defendants have adduced sufficient evidence in support of such averment, the affirmation at para. 9 of the statement of defence that "it can be inferred from the circumstances surrounding the sale, that it was intended that the defendants shall transfer only such title as it has at the time of the sale. The contract and the circumstances surrounding its conclusion are as follows" followed by the paras. (a) to (g) as in para. 9 of the statement of defence.

There is the evidence of DW1 who incidentally is the only witness for defendants.

Defendants seem to place much reliance to the "as is where is", clause 1 of the Terms/Conditions of Sale, to which DW1 said during examination-in-chief "it means the tenderer will take the vehicle as it is", during cross-examination "it means that there is a registration card available that is transferable, the tenderer comes and if he is satisfied with the vehicle he pays the money and he takes the vehicle" and during re-examination that the motor car was transferred to plaintiff "with no problems".

I do not know whether the explanation of "as is where is" given by DW1 can include matters pertaining to the title of the motor car envisaged in s. 12(3) of the Act. There is no evidence that such is the trade usage of the term "as is where is", there are no circumstances to show that such is the trade usage of the term "as is where is" and I am doubtful as to the reasonableness of claim to such trade usage and "a person can only be assumed to have acquiesced in a reasonable trade usage. The test of reasonableness is what a reasonable, honest and right minded person considers the usage concerned to be fair and proper. A usage which outrages the sense of justice and commensense is not reasonable", *Preston Corporation Sdn. Bhd.* [1982] 2 MLJ 22 FC at 25, 26, 27.

And with respect I agree with and I adopt paras. 4, 6 and 7 of Counsel for plaintiff's written submission dated 19 January 1996.

> 4. On the present facts, s. 12(2)(b) of the sale of Goods Act 1979 clearly and unarguably applies in Sabah by virtue of the lawful seizure of the said vehicle by the Customs department. The facts of the present case is indistinguishable from the facts in *Heng Long Motor Trading Co. v. Osman bin Abdullah* [1994] 2 MLJ 456 which is a High Court decision by Chong Siew Fai J (As he then was). It was held in this case (under Held 2 at p. 457) that:

Based on the finding that there had been a sale of the van by the dealer to the customer, it was obvious that there had been a breach of the implied warranty of quiet possession of the van under s. 12(2)(b) of the UK Sale of Goods Act 1979 due to the lawful seizure of the van by the customs & excise department. The implied warranty of quiet enjoyment protects the buyer not only against all acts of the seller but also the lawful acts of third persons. *If a buyer's full possession of goods is disturbed by a third party within his or its rights, the buyer is entitled to hold the seller liable and to be indemnified by the seller. The passage of time after the purchase, in itself, is no bar to the buyer's right of protection since time does not begin to run till the buyer's possession is disturbed.*

xxxx xxxx

xxxx xxxx

6. It is also submitted that the Sale of Goods Act 1979 with reference to s. 12(2)(b) thereof equally applies to **second-hand goods** such as the present vehicle. The authority for this proposition is contained in:

   (a) **Benjamin's Sale of Goods**, 3rd Edn., *Sweet & Maxwell* p. 7-8 under the heading "General Scope of the Act";

   (b) *Mason v. Burningham* [1949] 2 All ER 134 which involves a "second-hand typewriter."

7. The implied warranty in s. 12(2)(b) implied a warranty that the plaintiff shall have and enjoy quiet possession of the said vehicle in the future and not merely at the time of sale. Even if title or property to the said vehicle had passed to the plaintiff, this implied warranty is still applicable. No exception could be implied into s. 12(2) either in relation to disturbance by someone with a title paramount or in relation to a title paramount which had only come into existence **after the time of sale**. Apart from the *Heng Long Motor Trading Co.* case, *supra*, the additional authority for this proposition of law is laid down in *Microbeads AC & Anor. v. Vinhurts Road Markings Ltd.* [1975] 1 All ER 520.

With respect, I am of opinion that defendants have not adduced sufficient evidence, have not adduced sufficient evidence in support of the averment, the affirmation at para. 9 of the statement of defence, have therefore not discharged the burden of proof as to be able to avail themselves of s. 12(3) of the Act.

As regards damages, with respect, I agree with para. D1 of Counsel for plaintiff's written submission dated 19 January 1996:

D. Conclusion

1. It is respectfully submitted that upon a breach of the implied warranty in s. 12(2)(b) of the Sale of Goods Act 1979, the measure of damages which the plaintiff is entitled to claim is laid down in s. 53(2) of the Sale of Goods Act 1979 which provides as follows:

> The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

Judgment for plaintiff as in paras. 10(1), 10(4) and 10(6) of plaintiff's amended statement of claim dated 3 February 1993.

Reported by W.A. Sharif